PETE STAMATAKIS
v.
BUREAU OF LAND MANAGEMENT

IBLA 88-570 Decided June 15, 1990

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., affirming a District Manager decision denying Pete Stamatakis' application for a grazing permit. Utah 6-88-1.

Affirmed.

1. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Burden of Proof--Appeals: Generally--Rules of Practice: Appeals: Burden of Proof--Rules of Practice: Evidence

In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision.

2. Grazing Leases: Generally--Grazing Permits and Licenses: Generally

The holder of the expiring permit must accept the terms and conditions to be included in the new permit in order to receive first priority for receipt of the new permit. When a BLM notice seeking applications for a grazing permit sets out conditions for issuance of the permit which are within the scope of BLM's authority, the conditions are not arbitrary and capricious, and when it is clear that an applicant who may otherwise qualify for first priority has no desire to meet those terms and conditions, it is proper for BLM to reject the application because the applicant does not intend to meet the terms and conditions precedent to issuance of the permit.

APPEARANCES: Pete Stamatakis, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Pete Stamatakis (Stamatakis) has appealed from a June 24, 1988, summary decision issued by Administrative Law Judge John R. Rampton, Jr., affirming an August 26, 1987, final decision of the Moab District Manager, Bureau of Land Management (BLM). In his August 1987 decision the Moab District Manager had denied Stamatakis' application for a grazing permit. Utah 6-88-1.

The record indicates that Stamatakis had been a sheep rancher in the Price, Utah, area for some time prior to the decision giving rise to the present appeal. In the course of his ranching operation he had used a BLM allotment designated as the Anderson allotment on a non-renewable yearly basis.

In October 1985, Stamatakis applied for transfer of the Anderson allotment privileges, but no action was taken on his application. In March 1987, BLM published a legal notice in a Price, Utah, paper seeking applications for a grazing permit for lands in the Anderson allotment. The notice contained specific language that: "The permit will be * * * for use between December 1 and February 28. * * * A stipulation of the grazing permit will require the permittee to construct a fence meeting BLM requirements and standards prior to the allotment being grazed by the permittee's livestock."

Stamatakis submitted one of the two timely applications filed in response to BLM's notice. On July 6, 1987, the Price River Resource Area Manager issued a notice of proposed decision advising both applicants of his intent to award the permit to Marsing, the other applicant, and to incorporate the Anderson allotment into the Miller Creek allotment. The award of the allotment was made contingent upon construction of a fence within 1 year from the date of the allotment award, and further provided that the allotment could not be used for grazing until the fence was completed.

The Area Manager made the following additional observations in the notice of proposed decision:

> Marsing's application was submitted as per the requirements of the legal notice. Discussions with Marsing revealed he was willing to fence the northern and eastern boundaries, thus incorporating the Anderson allotment into the Miller Creek allotment. This allotment consolidation will simplify the administration of the public range. Mr. Stamatakis applied with spring use, whereas the legal notice specified the allotment was for winter use. In subsequent discussions with Mr. Stamatakis, he indicated that he was not willing to fence the north boundary. Absence of a fence in this location allows livestock free access to public land from adjacent private land. Uncontrolled access increases the difficulty in protecting the public range from unauthorized use.

Stamatakis filed a timely protest, and a meeting was held on August 17, 1987, to give him an opportunity to voice his objections. The August 26, 1987, notice of final decision was then issued. In his notice the District Manager noted that, during the course of the August 17 meeting, Stamatakis set forth three major claims: (1) It was unnecessary to fence the northerly boundary of the allotment because the Carbon canal served as an adequate barrier to livestock access; (2) Spring use of the allotment was better than winter use because the squirrel tail grass on the allotment was more suitable for spring use; and (3) In order to meet his needs, Stamatakis would use the allotment primarily in the spring, with lesser winter use, with the number of animals using the allotment varying from day-to-day during that period. The District Manager then addressed each of those claims.

The District Manager stated that the canal was not a sufficient barrier because it did not prevent access by cattle or horses and would not prevent access by sheep when the water was low or frozen. He also noted the mixed ownership of the lands to the south of the canal and concluded that the canal could not adequately serve as a barrier between private and public lands. He then found that the stated purpose for the fence was to "control livestock used on the Anderson Allotment. In fact, your proposal not to fence in order to allow sheep to move easily from private to public lands is the antithesis of control" (Notice of Final Decision at 1; emphasis omitted).

Addressing the second contention raised by Stamatakis, the Manager noted that the presence of squirrel tail grass was the likely result of past grazing practice. He explained that the Anderson allotment was considered to be a salt desert range, and that in high serial conditions these ranges would contain less than 10 percent squirrel tail grass. He stated that according to the best available information, the best grazing regime for salt desert shrub ranges is light to moderate winter use with periodic rest, and that winter use was the recommended seasonal use under the Price River Resource Area Management Framework Plan. He also noted that winter use would result in lower erosion rates than spring use.

The District Manager also found that the use pattern proposed by Stamatakis (i.e., no fencing, variable dates of use and fluctuating numbers of animals on the allotment) would create an undesirable management condition by compromising the orderly administration of the range land. He noted that, in order to meet the requirements of 43 CFR 4130.6-1, BLM must be able to reasonably know when and how the allotment range is being used.

In summary, the District Manager concluded that Stamatakis' application failed to meet the requirements of the legal notice seeking applications with respect to seasonal use and fencing. He further found these requirements to be reasonable and necessary for the orderly administration of the public lands. Accordingly, he adopted the Area Manager's proposed decision without change. Stamatakis filed an appeal pursuant to 43 CFR 4.470, and the case was assigned to Administrative Law Judge Rampton.

In his notice of appeal, dated September 27, 1987, and received on October 2, 1987, Stamatakis reiterates his belief that he should be awarded the allotment because of his historic use, and his contentions that no fence is required, and that he should be allowed to use the allotment for spring grazing. He noted that he would suffer an economic loss if the allotment were not awarded to him and contended that the decision "to change the season of use for this allotment was made in a vacuum."

On February 1, 1988, the Assistant Regional Solicitor, Department of the Interior, filed a Motion for Summary Judgment (SJ Motion) on behalf of BLM. 1/ In addition to noting the facts set out above, BLM averred that "Stamatakis never held a grazing permit on the Anderson allotment. His prior uses were on a strictly temporary year-by-year basis which can confer no right to any preferential treatment regarding the Anderson allotment" (SJ Motion at 2). As a basis for its motion, BLM noted that the Marsing application met the terms and conditions set out in the legal notice, and that Marsing had agreed to be bound by and comply with those terms, but Stamatakis had neither agreed to comply with those terms nor desired to obtain a permit under those terms. The Solicitor then opined that there were no material disputed facts, a formal hearing need not be held, and the matter could be resolved by issuance of a summary judgment.

Having received no response to the BLM motion, Judge Rampton issued an Order to Show Cause on March 10, 1988. In his order he noted the Solicitor's February 12, 1988, allegation that

> there are no relevant facts in issue. It is the position of [BLM] that denial of [Stamatakis'] application * * * must be sustained because it failed to meet the specifications in the published notice offering a grazing permit * * *. Further, [BLM] alleges that [Stamatakis'] prior use was on a temporary, year to year basis which can confer no right to any preferential treatment based upon historic use * * *.

(Order to Show Cause at 1). Judge Rampton then gave Stamatakis 14 days to respond to the motion for summary judgment, by stating what, if any, relevant facts were in dispute. He noted further that if Stamatakis were to choose to rely solely upon the facts as set out in the District Manager's decision and his notice of appeal, Stamatakis should "state with specificity the regulations and decisions which support his position" (Order to Show Cause at 2).

Stamatakis responded in a document received on March 25, 1988. He stated that he never received a response to his application dated October 18, 1985, and enclosed a copy of that application. He also noted his use of the allotment between April and early June for 5 consecutive years, claiming that no ill effects resulted from that use. He then stated

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1/ The Solicitor's Office did not make an appearance and no documents were filed on behalf of BLM during the course of the appeal to this Board. See 43 CFR 4.414.

that "I do not wish to fence the entire permit * * *" and gave the above-noted reasons for not doing so. He additionally asserted that the fact his sheep require a sheepherder and the economic conditions of sheep ranching are additional reasons for not building a fence.

On June 24, 1988, Judge Rampton issued his summary decision finding there to be no material issue of fact requiring a hearing and that "the District Manager's final decision was reasonable and correct in denying the application of Pete Stamatakis for a grazing permit in the Anderson Allotment because Mr. Stamatakis showed an unwillingness to comply with reasonable terms incorporated in the permit" (Summary Decision at 3). He then affirmed the District Manager's decision. Stamatakis appealed to this Board.

In his statement of reasons for appeal (SOR) to this Board, Stamatakis states that he is appealing "because of the District Manager's disregard for those regulations pertaining to grazing administration of the public lands and disregard of cost effective expenditure of public funds and BLM's policy with respect to requirements for fencing between private and public lands" (SOR at 1). He then sets out five reasons for this contention.

First, he again notes the fact that in October 1985 he filed an application for a grazing permit, contending that the application was made pursuant to 43 CFR 4110.1, 43 CFR 4110.2-1, and 43 CFR 4110.2-2. He complains that his application was not even acknowledged during a period when there were no conflicting applications.

As his second basis, Stamatakis alleges that, 18 months after he filed his application, BLM arbitrarily advertised for bids on the Anderson allotment. He claims this is an unnecessary waste of public funds.

As a starting point for his third basis, Stamatakis notes that two conflicting applications had been submitted in response to the public notice. Referring to the statement on the notice that, in such event, the determination would be made pursuant to 43 CFR 4130.1-2, he argues that, while sections (b), (d), (e), and (f) would apply to both applications, sections (a) and (c) were applicable to him only. He then restates his objection to the provision that a fence must be constructed on the northern boundary of the allotment separating the allotment from private land owned by him, noting his opinion that "the canal which generally follows the boundary is an effective barrier," that any sheep he would place on the allotted ground would be managed by a sheepherder, making the fence unnecessary; and that the use of funds to survey for the fence would be a misappropriation of Federal funds.

In his fourth argument Stamatakis contends that the actions are arbitrary and capricious in the face of the District Manager's statement that the fence is needed because BLM must know with confidence how many and at what time livestock are on the allotment. He claims that the ability to tell how many animals are on the Anderson allotment would be totally lost if the Anderson allotment were combined with the Miller Creek allotment.

As his last point Stamatakis contends that there has never been any reason to believe that the allotment was being overgrazed during the time he had used the allotment. He asserts that the spring use for sheep grazing was, in fact, improving the range conditions on the Anderson allotment. He finds specific fault with BLM's reliance upon a report that salt desert shrub ranges are best suitable to light to moderate winter use, claiming that research reports from the same agency also find that the best use for salt desert shrub ranges is sheep grazing.

In conclusion he urges the Board to examine the case and find that BLM acted without regard to his economic well-being, historic use, and fiscal accountability.

[1] In an appeal from a decision by an Administrative Law Judge on motion for summary judgment after argument by the parties, the appellant has the burden of showing either the existence of an issue of material fact which might alter the outcome of the proceedings or an error of law in the decision. Therefore, in order to prevail before this Board, Stamatakis must show that Administrative Law Judge Rampton committed a material error of fact or law in his decision.

[2] BLM filed a public notice outlining action it proposed to take regarding the Anderson allotment. This action included the granting of a grazing permit for that allotment under terms and conditions set out in the notice. These terms included limiting the use of the allotted lands to the months of December through February, and the requirement that the allotment be fenced on the northerly and westerly sides. There can be no question that Stamatakis did not desire to receive the allotment under the terms and conditions set out in the notice when he filed his application in response to the public notice, and he remains firm in his desire to have an allotment for spring use and without the requirement for building a fence.

It is unfortunate when, in a case such as this one, a rancher having adjoining property desires a grazing permit and is denied that permit. This denial will have a direct economic impact on his ranching operations. However, considering the statutory constraints, it would not be proper to overturn the BLM decision and direct that a lease be awarded to Stamatakis.

Stamatakis argues that his use for a period of 5 years created a priority. BLM argues that the nature of that use does not create such a right. However, under the circumstances of this case, it makes no difference. It is only when the permittee "accepts the terms and conditions to be included * * * in the new permit * * * [that] the holder of the expiring permit * * * shall be given first priority for receipt of the new permit." 43 U.S.C. § 1752(c)(3) (1982).

The two conditions announced in the notice were both within BLM's scope of authority. It has the authority to allow and require construction of fences. See 43 U.S.C. §§ 315a and 315c (1982). It also has the authority to regulate the amount and time of use. See 43 U.S.C § 1903(b) (1982). Therefore, in order to prevail before the Administrative Law Judge, Stamatakis was required to show that the BLM decision to fence the allotment

and to limit the grazing use to the winter months was an arbitrary application of its authority or that it was based upon a mistake of fact.

Stamatakis voiced his objections to the proposed decision and an informal meeting was held to afford him an opportunity to submit evidence and testimony. Following this meeting a final decision was issued. The decision addressed the original contentions and the contentions raised during the informal meeting. Stamatakis again filed a protest and a hearing was ordered pursuant to the provisions of 43 CFR 4.470. During the pre-hearing proceedings counsel for BLM filed a motion for summary judgment alleging that there were no material facts in issue. Stamatakis did not respond to the motion and Judge Rampton then issued an order to show cause why he should not issue a summary judgment in favor of BLM. Stamatakis' response to the order was considered and addressed in Judge Rampton's decision granting summary judgment.

After review of the case file and the evidence submitted in support of his appeal, we find that Stamatakis has not shown that the action taken by BLM was arbitrary or that there is a material mistake of fact or law. It is clear that he neither desired nor intended to comply with the terms and conditions requisite to the grant of the permit, and thus he never filed a valid application for that permit. Judge Rampton's decision must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Rampton is affirmed.

R. W. Mullen
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge